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Johan Shipping Sdn Bhd v Public Bank Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–1366-06 OF 2013
ABDUL WAHAB PATAIL, MOHTARUDIN BAKI AND MAH WENG KWAI JJCA
13 MAY 2015

C

Civil Procedure — Appeal — Originating summons — Dismissal of originating summons to challenge validity of various security instruments — Security instruments created during subsistence of restraining order — Instruments were debenture and fixed and floating charges — Whether instruments constituted D *disposition — Whether leave of court obtained for creation — Whether void — Companies Act 1965 s 176(1)*

The appellant appealed against the dismissal of its originating summons to E challenge the validity of various security instruments ('the said security instruments') in respect of six specific shipping vessels owned by the appellant created in favour of the respondent during the subsistence of the appellant's restraining order ('RO') obtained under s 176(10) of the Companies Act 1965 ('the Act'). The security instruments were a debenture and fixed and floating F charges. The challenge was on the premise that the said instruments constituted a 'disposition' of the property of the company within the meaning of s 176(10C) of the Act, and therefore void since no leave of court was obtained for the creation of the same. While the RO was subsisting, the appellant and the respondent entered into an agreement on restructure and G reschedule (R&R) arrangement for 13 fixed loan ('FL') and *al-bai bithaman ajil* ('ABBA') ('the R&R agreement'). The R&R agreement, amongst other things, for the appellant to undertake to cause a new specific debenture to be created in favour of the respondent, over six unencumbered vessels, as additional security for various loan facilities held with the respondent. Notwithstanding no leave H of court, as required by s 176(10C) of the Act was obtained for the creation of the said security instruments created and registered the same day, 30 November 2010. When the proposed scheme of arrangement did not materialise, the appellant went into voluntary liquidation. However, the respondent sold five of the six vessels charged under the security instruments for the sum of I RM20.5m.

Held, allowing the appeal; setting aside the order of the High Court:

(1) Since no leave of court was obtained under s 176(10C), the said security instruments would, therefore, be void and the RM20.5m would have to

be returned to the appellant, if the security instruments were a disposition of property; and unless the said security instruments were made in the ordinary course of business (see para 7).

(2) Although the security instruments was not a transfer, it was a disposition in that the six unencumbered vessels were charged as security to the respondent under which the respondent had the right to dispose of the vessels, not under a financing arrangement where there is loan funds received, but as additional security for existing debt. This was evident from the letter from the respondent and security instruments (see para 8).

(3) The making of security instruments as a business is in the ordinary course of business of the respondent as a bank. The appellant was in the shipping business and its assets comprised primarily of shipping vessels. Its business was shipping. One of the ways to finance the shipping vessels was to raise the money by charging the vessels. But it was quite another to charge vessels owned under a new charge as was the case of the security instruments. The said security documents were not made in the ordinary course of business and therefore not exempted from the requirement of leave of court under s 176(10C) (see para 8).

[Bahasa Malaysia summary

Perayu merayu terhadap penolakan saman pemulanya untuk mencabar kesahan pelbagai instrumen cagaran ('instrumen cagaran') berkaitan enam kapal spesifik yang dimiliki oleh perayu yang dibentuk memihak responden semasa kewujudan perintah penahanan perayu ('RO') yang diperolehi di bawah s 176(10) Akta Syarikat 1965 ('Akta'). Instrumen cagaran tersebut adalah debentur dan caj tetap dan terapung. Cabaran adalah atas dasar bahawa instrumen tersebut membentuk 'disposition' hartanah syarikat dalam maksud s 176(10C) Akta, dan oleh itu batal memandangkan tiada izin mahkamah diperolehi bagi pembentukannya. Sementara RO wujud, perayu dan responden memasuki perjanjian atas penyusunan pengstrukturan semula dan penjadualan semula (R&R) bagi 13 pinjaman tetap ('FL') dan *al-bai bithaman ajil* ('ABBA') ('perjanjian R&R tersebut'). Perjanjian R&R tersebut, dan antara lain, untuk perayu berjanji untuk menyebabkan debentur spesifik baru dibentuk memihak responden, lebih daripada enam kapal yang tidak dicagarkan, sebagai jaminan tambahan untuk pelbagai kemudahan pinjaman yang dipegang oleh responden. Walaupun tidak ada izin mahkamah seperti yang dikehendaki oleh s 176(10C) Akta diperolehi bagi pembentukan instrumen cagaran tersebut, dibentuk dan didaftarkan pada hari yang sama, 30 November 2010. Apabila skim penyusunan yang dicadangkan tidak menjadi, perayu memasuki pembubaran sukarela. Walau bagaimanapun, responden menjual lima daripada enam kapal yang dicaj di bawah instrumen cagaran bagi jumlah RM20.5 juta.

Diputuskan, membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi:

(1) Memandangkan tiada izin mahkamah diperolehi di bawah s 176(10C), instrumen cagaran tersebut akan, oleh itu menjadi batal dan RM20.5 juta tersebut akan dipulangkan kepada perayu, jika instrumen cagaran adalah pelupusan hartanah; dan kecuali instrumen cagaran dibuat dalam perjalanan biasa perniagaan (lihat perenggan 7).

(2) Walaupun instrumen cagaran bukan pindah milik, ia adalah pelupusan di mana enam kapal yang tidak dicagarkan dicaj sebagai jaminan kepada responden di bawah mana responden mempunyai hak untuk melupuskan kapal-kapal tersebut, bukan di bawah penyusunan kewangan di mana dana pinjaman diterima, tetapi sebagai jaminan tambahan untuk hutang yang ada. Ini adalah jelas daripada surat daripada responden dan instrumen cagaran tersebut (lihat perenggan 8).

(3) Pembuatan instrumen cagaran sebagai perniagaan adalah dalam perjalanan biasa perniagaan responden sebagai sebuah bank. Perayu adalah dalam perniagaan perkapalan dan asetnya terutamanya terdiri daripada kapal. Perniagaannya adalah perkapalan. Salah satu cara untuk membiayai kapal adalah menambahkan wang dengan mencajkan kapal-kapal tersebut. Tetapi adalah agak berbeza apabila mencajkan kapal-kapal yang dimiliki di bawah caj baru seperti kes instrumen cagaran tersebut. Dokumen jaminan tidak dibuat dalam perjalanan biasa perniagaan dan oleh itu tidak dikecualikan daripada keperluan izin mahkamah di bawah s 176(10C) (lihat perenggan 8).]

Notes

For cases on appeal in general, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 793–1970.

Cases referred to

Affin Bank Bhd v Malayan Banking Bhd [2009] 2 MLJ 74, CA (not folld)

Legislation referred to

Companies Act 1965 ss 176(10), (10C)
Merchant Shipping Ordinance 1952

Appeal from: Originating Summons No Q-02–1366–06 of 2013 (High Court, Kuching)

George Lo (Wong Li Ching with him) (George Lo & Partners Advocates) for the appellant.
Sim Hui Chuang (Lim Lip Sze with him) (Reddi & Co Advocates) for the respondent.

Abdul Wahab Patail JCA:

[1] The plaintiff Johan Shipping Sdn Bhd (in liquidation) ('the appellant') appealed against the dismissal on 22 April 2013 of its originating summons.

[2] By its originating summons, the appellant had challenged the validity of various security instruments ('the said security instruments') in respect of six specific shipping vessels owned by the appellant created in favour of the defendant Public Bank Bhd ('the respondent') during the subsistence of the appellant's restraining order ('RO') obtained on 13 October 2010 under s 176(10) Companies Act 1965, ('the Act').

[3] The security instruments were a debenture and fixed and floating charges all dated 30 November 2010. The challenge was on the premise that the said instruments constituted a 'disposition' of the property of the company within the meaning of s 176(10C) of the Act, and therefore void since no leave of court was obtained for the creation of the same.

[4] The RO had remained in force from 13 October 2010 until 7 July 2011. While the RO was subsisting, the appellant and the respondent entered into an agreement on restructure and reschedule (R&R) arrangement for 13 fixed loan ('FL') and *al-bai bithaman ajil* facilities ('ABBA') ('the R&R agreement') on 30 November 2010. The R&R agreement, amongst other things, for the appellant to undertake to cause a new specific debenture to be created in favour of the respondent, over six unencumbered vessels, as additional security for various loan facilities held with the respondent.

[5] It was not disputed that notwithstanding no leave of court as required by s 176(10C) of the Act was obtained for the creation of the said security instruments created and registered the same day, 30 November 2010. When the proposed scheme of arrangement did not materialise, the appellant went into voluntary liquidation on 8 August 2011. However, the respondent sold five of the six vessels charged under the security instruments for the sum of RM20.5m.

[6] Section 176(10C) provided:

> Any disposition of the property of the company, including things in action and any acquisitions of property by the company, other than those made in the ordinary course of business, made after the grant of the restraining order by the Court shall, unless the Court otherwise orders, be void.

[7] Since no leave of court was obtained under s 176(10C), the said security instruments would, therefore, be void and the RM20.5m would have to be

returned to the appellant, if the security instruments were (a) a disposition of property and (b) unless the said security instruments were made in the ordinary course of business.

[8] Having considered the submissions for the respondent, we dismissed the submissions for the following reasons:

(a) although the security instruments was not a transfer, it was a disposition in that the six unencumbered vessels were charged as security to the respondent under which the respondent had the right to dispose of the vessels, not under a financing arrangement where there is loan funds received, but as additional security for existing debt. This is evident from the letter dated 22 October 2010 from the respondent and security instruments; and

(b) the making of security instruments, as a business is in the ordinary course of business of the respondent as a bank. The appellant was in the shipping business and its assets comprised primarily of shipping vessels. Its business was shipping. We appreciate the fact that one of the ways to finance the shipping vessels is to raise the money by charging the vessels. But it is quite another to charge vessels owned under a new charge as is the case of the security instruments. We hold that the said security documents were not made in the ordinary course of business and therefore not exempted from the requirement of leave of court under s 176(10C).

[9] A supplemental submission was made for the respondent. Briefly it was that prior to the debenture comprised in the security documents, the respondent was already secured creditor under the six pre-existing debentures granted. Clause 4.01 of the debenture dated 14 August 1996 created a floating charge upon vessels both present and future. We find little support for the respondent's proposition from *Affin Bank Bhd v Malayan Banking Bhd* [2009] 2 MLJ 74. The case did not involve an RO and restructure under s 176(10C), nor as averred in the affidavit by Ling Haan Tiang, deposed for the respondent, that the debenture comprised in the security instrument was '... additional security to supplement pre-existing securities comprising, amongst others, the Debentures'. That the vessels were until 30 November 2010 'unencumbered' contradicts the submission that the vessels the subject of a floating charge before 30 November 2010, and even if the vessels were the subject of a floating charge, the agreed term was that, as contained in the all-monies debenture dated 14 August 1996, the appellant as borrower was to charge by way of a fixed mortgage on all vessels of the borrower both present and future, in respect of which the borrower shall at the request of the bank execute mortgages under the Merchant Shipping Ordinance 1952 in favour of the bank or such other legal documents as required by the bank from time to time to the exclusion of

any prior encumbrance (save those outstanding mortgages). The debenture of 14 August 1996 did not directly confer upon the respondent the power to sell the vessels and collect payment, but consistent with the notion of a floating charge, obliged the appellant to execute a mortgage when required by the respondent to do so. There is no evidence that prior to 30 November 2010 the appellant had been required to and had executed mortgages that empowered the respondent to sell the vessels and collect the RM20.5m payment.

[10] For the foregoing reasons, we allowed the appeal, set aside the order of the High Court, fixed costs at RM30,000 and ordered the deposit be refunded.

Appeal allowed; order of the High Court set aside.

Reported by Afiq Mohamad Noor